FILE COPY

IN THE

Supreme Court of the United States

NO. 24

OCTOBER TERM, 1969

JOSEPH WALLER, JR.,

Petitioner.

—vs—

STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING

EARL FAIRCLOTH
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TABLE OF CITATIONS

Page

CASES

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Comes now the State of Florida, respondent in the above-styled cause, pursuant to Rule 59 (2), as amended in 1967, and petitions the Court for rehearing in the cause and for reason therefor would show as follows:

This court rendered its decision in the above-styled cause on April 6, 1970. This petition is filed well within the 25 day requirement so as to confer jurisdiction on this Court in order that it might consider the matter.

Though styled a petition for rehearing, the matter actually sought to be put to this Court is one in which respondent requests either modification or clarification of the dispositional portion of the Court's decision, to-wit:

> "The second trial of petitioner which resulted in a judgment of conviction in the state court for a felony having no valid basis, that judgment is vacated and the cause remanded to the District Court of Appeal of

Florida, Second District, for further proceedings in accord with this opinion."

From the above quoted portion of this Court's decision, one well might gather that petitioner is to be discharged after the Second District Court of Appeal of Florida vacates the judgment pursuant to this Court's mandate should it issue as presently intended.

This can hardly be the intended result in light of the fact that the District Court of Appeal in and for the Second District of Florida bottomed its decision exclusively on the separate sovereign theory (see Thiesen v. McDavid, 34 Fla. 440, 16 So. 321) which this Court unanimously rejected in the case.

There has never been a holding by the Second District Court of Appeal of Florida that the two municipal violations (1) destruction of city property and (2) disorderly breach of the peace, are lesser and included offenses of the felony of grand larceny.

The predicate for this Court's decision was its decision in Grafton v. U. S., 206 U.S. 333 (1907) from which it was concluded that the separate sovereign theory had to fall for the reasons enunciated therein. Terminally, this Court's decision was that the dual sovereign theory was an anachronism which it would no longer abide. However, this result would only apply if and when the two municipal violations already referred to were in fact lesser and included offenses of the felony of grand larceny.

It would be inappropriate for this Court to decide whether they were in fact so included inasmuch as this is a question of state law and not of constitutional principle. If they are not lesser and included offenses, then the question of jeopardy may not be disposed of, as it seems to have been done in the

case at bar, by ordering the judgment vacated. It is not enough to assume that they are lesser and included if in fact under Florida law they cannot be so characterized. It further would seem to follow that if, as respondent submits, they are not lesser and included offenses, then the dispositional portion of this Court's decision could have no meaningful application based upon the theory of separate sovereigns.

Moreover, it is certain that the decision here could not have been bottomed on the single transaction theory. The Court's specific holding in Ashe v. Swenson, No. 57, Oct. Term 1969, Opinion rendered April 6, 1970, is very pointedly bottomed on the principle of collateral estoppel and nothing else; with the Chief Justice dissenting, and specifically rejecting the "single frolic" theory. In light of those views expressed by the Chief Justice in Ashe, supra, the respondent respectfully suggests that the single transaction theory could not have been the rationale for the opinion in this case.

Because it is obvious that jeopardy, in light of the opinion in the case at bar, could only be said to have attached if and when those municipal violations are determined to be lesser and included offenses of grand larceny, it is respectfully submitted that the matter should be remanded to the District Court of Appeal in and for the Second District of Florida so as to determine that very question. It well may be that, if they are separate and distinct offenses, this Court might conclude that some disposition of petitioner's claim, other than vacating the judgment, should be made. A remand under the presently worded disposition could result in only one decision of the Second District Court and that would be to discharge petitioner from the judgment. Since that has been demonstrated to be a non sequitur in terms of the theory of separate sovereigns, an amended decision with regard to the disposition to be made by the Second District Court of Appeal should and ought to be rendered.

This petition does not seek a reversal of this Court's opinion but rather seeks clear directions in order that the Second District Court will know what should or may be done with the matter on remand. Therefore, this Court could, with consistency, deny this petition for rehearing and yet remand the matter in order that the Second District Court might decide the critical question or whether the two municipal violations were in fact lesser and included offenses of grand larceny. See Securities and Exchange Commission v. Drexel & Co., 349 U.S. 910, 913; Slochower v. Board of Higher Education, 351 U.S. 944; and Union Trust Co. v. Eastern Air Lines, 350 U. S. 962.

WHEREFORE, respondent respectfully moves the Court to grant so much of the petition for rehearing as is consistent with the argument made therein.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

WILLIAM D. ROTH
Special Assistant Attorney General

Counsel for the Respondent.

I hereby certify that the foregoing Petition for Rehearing is presented for this Court's consideration in good faith and not merely for delay.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Petition for Rehearing to petitioner's counsel, the Honorables Leslie Harold Levinson, 2925 N. W. 12th Place, Gainesville, Florida 32001; Melvin L. Wulf, 156 Fifth Avenue, New York, New York 10010; and Gardner W. Beckett, Jr., 52 Sixth Street South, St. Petersburg, Florida 33701, by mail, this _____ day of April, 1970.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Respondent.